Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

GAYE WELCH-BROWN and
CLAXTON N. WELCH, JR., *Petitioners*

v.

WILLIAM H. BELL, II and
LOUIS W. BELL, *Respondents.*

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the appellate rules of the State of Alabama governing the procedures for correcting omissions of the record on appeal were applied so as to deprive the petitioners-appellants of rights guaranteed to them by the Fourteenth Amendment's Equal Protection Clause when the lower courts refused to correct the record on appeal for which advance payment was made.
2. Whether the Alabama Supreme Court after taking the step, not required by the U.S. Constitution, to afford the petitioners-appellants the appeal has violated the Fourteenth Amendment's Due Process Clause by denying the petitioners the right to a sufficiently complete record on appeal so that they could pursue their appeals.
3. Can a State with an appellate system which made available trial transcripts and records to those who can financially afford them be permitted to foreclose the paying petitioners-appellants from perfecting their appeals and leave them entirely cut off from any appeal at all?
4. Whether the petitioners-appellants' failure to file their brief by the extended time was due to their inability to overcome the lower courts' refusal to allow them to correct the omissions of the record on appeal after the petitioners-appellants in good faith made diligent efforts to correct the record.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Petitioner Gaye Welch-Brown is a resident and citizen of the State of California and of the United States of America. Petitioner Claxton N. Welch, Jr. is a resident and citizen of the State of Oregon and of the United States of America. Respondent Real Party in Interest William H. Bell, II is a resident and citizen of the State of Maryland and of the United States of America. Respondent Real Party in Interest Louis W. Bell is a resident and citizen of the State of Alabama and of the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gaye Welch-Brown, in pro se, and Petitioner Claxton N. Welch, Jr., in pro se, respectfully prays that a writ of certiorari issue to review the decisions of the Supreme Court of the State of Alabama on the petition for writ of mandamus, entered on July 20, 2006; the application for rehearing, entered on August 16, 2006; and the motion to vacate the sua sponte order of dismissal for failure to prosecute and all other pending motions and petitions, entered on August 16, 2006.

OPINIONS BELOW

The opinion of the Alabama Supreme Court to review the merits of the petition for a writ of mandamus appears at Appendix A, infra, to this petition and is unpublished.

The opinion of the Alabama Supreme Court dismissing the consolidated appeal for failure to prosecute appears at Appendix B, infra, to this petition and is unpublished.

The opinion of the Alabama Supreme Court denying the application for rehearing of the writ petition, the motion to vacate sua sponte order dismissing the consolidated appeals; and all pending motions and/petitions appears at Appendix C, infra, to this petition and is unpublished.

The opinion of the Circuit Court of Conecuh County, Alabama Supreme Court denying the motion to correct the omissions of the record on appeal appears at Appendix D, infra, to this petition and is unpublished.

JURISDICTION

The date on which the Alabama Supreme Court denied a discretionary review of the petitioners' application for rehearing of the petition for writ of mandamus and of the motion to vacate the sua sponte order of dismissal was August 16, 2006. A copy of that collective decision appears at Appendix C.

This petition for writ certiorari is being filed within 90 days of the date of August 16, 2006.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part: "[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." United States Constitution, Article VI, cl. 2.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction.

Section 10 of the Alabama Constitution provides as follows:

> That no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

Alabama Rules of Appellate Procedure, Rule 1 appears at Appendix E p. 8.

Alabama Rules of Appellate Procedure, Rule 10(f) appears at Appendix E, p. 8.

Alabama Rules of Appellate Procedure, Rule 28(e) appears at Appendix E, p. 11.

Canon 3C(1) of the Alabama Canons of Judicial Ethics appears at Appendix E, p. 12.

STATEMENT OF THE CASE

As this Court stated in Rinaldi v. Yeager, 384 U.S. 305, (1966): "This court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Id., at 310.

This case presents a facial challenge to the constitutionality of the decisions rendered by the courts below that resulted in deprivation of rights guaranteed under the Fourteenth Amendment of the U.S. Constitution. In this case, the pivotal conflict is the deprivation of the right to have a sufficiently complete record on appeal, or its equivalent, for presentation of each of the appellants' separate contention to the appellate tribunal.

On March 8, 2005, Petitioners Gaye Welch-Brown, in pro se (and the administrator of the subject probated estate), and Claxton N. Welch, Jr., in pro se, filed their respective notice of appeal from the Circuit Court of Conecuh County, Alabama ("Circuit Court") in a civil action wherein the final judgment was entered on September 28, 2004, in favor of the respondents and adverse to the petitioners.

Hereinafter, Petitioners Gaye Welch-Brown and Claxton N. Welch, Jr., will collectively be referred to as the "petitioners-appellants".

On April 20, 2005, the Alabama Supreme Court ("Alabama Supreme Court") granted the petitioners-appellants' motion to consolidate their respective cases on

appeal for the purpose of preparing the record on appeal, briefing, oral argument and decision.

The petitioners-appellants contend, inter alia, that the judgment rendered and entered by the Circuit Court conveyed real property belonging to the probated estate of their grandfather, Lewis Lazarus Welch, and great-grandfather, Louis Washington Welch (hereinafter, the "probated estate"), to a client of the respondents' attorney (and not a party to the action), without the Circuit Court having acquired subject-matter jurisdiction.

On June 8, 2005, the petitioners-appellants filed in the Circuit Court a motion to correct the record on appeal, which on the record called George Hendrix's, Circuit Clerk of Conecuh County ("Circuit Clerk"), attention to the multitude of documents and papers omitted from the record on appeal that he had certified, under oath, and misrepresented as being complete. Prior to this filing, petitioner-appellant Gaye Welch-Brown telephoned the Circuit Clerk to ascertain why certain designated documents and papers were omitted from the record on appeal and requested a correction of the omissions. The Circuit Clerk verbally refused to correct the omissions of the record on appeal claiming that the designated documents and papers were already included in the record on appeal, which was false, and that he and Pat Wright, the other "circuit clerk", had already spent too much time on the case.

On June 22, 2005, the petitioners-appellants filed in the Supreme Court their consolidated motion for relief, authorized under Rule 10(f) (Appendix E, p. 8), from the Circuit Court's order, pertaining to the motion to correct the record, which was deemed denied by operation of law because the Circuit Court failed to render a timely decision, within 14 days of the June 8, 2005, filing.

On July 5, 2005, some 13 days after the statutory period for disposing of the motion to correct the record on appeal

(filed on June 8, 2005), Circuit Judge Samuel Welch, entered an untimely order refusing to correct the record on appeal holding that the designated documents and papers were already included in the record on appeal, yet the locations in the record on appeal stated by the circuit judge were inaccurate and incomplete. (Appendix D) On July 12, 2005, the Supreme Court entered an order denying this motion on the ground that it was moot.

It was at this juncture of the case that the state courts' refusals to allow the petitioners-appellants a sufficiently complete record on appeal arose and manifested into a series of ping-pong and tug-a-war events. [1]

For example, on July 19, 2005, the petitioners-appellants filed in the Supreme Court another motion seeking relief from the Circuit Courts' order refusing to correct the record on appeal, which the motion was accompanied with exhibits consisting of one set of five volumes of the true and correct copies of the designated documents and papers that were in the Circuit Court's record, and represented the documents and papers that were omitted from the record. On July 29, 2005, the Supreme Court entered an order denying this motion on the ground that it, too, was moot.

On August 4, 2005, the petitioners-appellants filed in the Supreme Court a motion to set aside and vacate the July 5, 2005, order during the pendency of the appeals. On September 8, 2005, this motion was denied without an explanation.

On August 22, 2005, the petitioners-appellants filed in the Supreme Court a motion to correct the omissions of the record and to vacate the order of the circuit court denying the motion to correct the record.

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[1] The respondents did not oppose any of the post-judgment motions, including those seeking to correct the omissions of the record on appeal.

On October 5, 2005, the petitioners-appellants filed in the Supreme Court a request for a decision on their pending motion for an order directing the Conecuh County Circuit Clerk to correct the record on appeal, filed on August 22, 2005, or, in the alternative, request for an order authorizing them to supplement the record with the admitted evidenced filed in the court on July 19, 2005.

On November 5, 2005, the petitioners-appellants filed in the Supreme Court a motion to suspend the time for filing their brief during the pendency of appeal of the post-judgment order refusing to set aside and vacate the order refusing to correct the record, filed on July 5, 2005. (Appendix D) On November 7, 2005, the Supreme Court denied this motion without an explanation.

On November 26, 2005, the petitioners-appellants filed in the Supreme Court their motion to strike the order and notice entered on November 7, 2005, and reconsider the motion filed on November 5, 2005, supra. On November 30, 2005, the Supreme Court denied this motion without an explanation.

On March 11, 2006, the petitioners-appellants filed in the Supreme Court their motion to supplement the record on appeal with Exhibits 1 – 9 (representing the true and correct copies of the omitted documents and papers) in lieu of the court's refusal to enter the necessary order to correct the omissions of the record.[2] On May 9, 2006, the Supreme Court denied this motion without an explanation.

On June 1, 2006, the petitioners-appellants filed in the Supreme Court a motion to reconsider the motion to supplement the record, filed on March 11, 2006, and amend

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[2] Nine (9) copies of the multiple volumes (Exhibits 1 – 9) of "Correction to Record on Appeal in Support of Appellants' Motion for Relief from Judge Samuel H. Welch's Refusal to Enter An Order Necessary to Correct Record on Appeal" were filed in the Supreme Court on March 13, 2005, in support of the petitioners-appellants' motion to supplement the record with the same.

the order entered on May 9, 2006. On June 22, 2006, the Supreme Court denied this motion without an explanation.

On June 30, 2006, the petitioners-appellants filed in the Supreme Court a motion to suspend/extend the time for filing their brief pending disposition of the related petition for writ of mandamus (Supreme Court Case No. 1051467) still seeking relief from the Circuit Court's post-judgment order refusing to correct the omission of the record on appeal, filed on June 29, 2006.

On July 20, 2006, the Supreme Court denied the writ petition on the ground that it was seeking relief not available by mandamus (Appendix A) and cited Alabama Rules of Appellate Procedure, Rule 21 [3], and after establishing avenues for appeals and assuming jurisdiction of the petitioners-appellants' appeals, on the same date entered a sua sponte order dismissing the consolidated appeals for failure to prosecute, despite the obviously on-going prosecution of the case evidenced in the records of the courts below. (Appendix B)

On August 2, 2006, the petitioners-appellants filed in the Supreme Court the following three individual papers: Application for Rehearing (of writ petition), Motion to Vacate Sua Sponte Order of Dismissal, and a notice (to the Supreme Court's clerk) of the pending motions and the inaccurate docket sheets.

On August 16, 2006, the Supreme Court denied each of the three aforementioned filings made on August 2, 2006, including the Application for Rehearing. (Appendix B)

This Court has often refused to decide constitutional questions on an inadequate record. Hedgebeth v. North Carolina, 334 U.S. 806 (1948). However, in this case, the

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[3] Alabama Rules of Appellate Procedure, Rule 21 pertains to writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs, and is not quoted in the Appendices herein.

inadequate record is due to no fault of the petitioners-appellants.

The first conflict in this present case concerns a fundamental question intended to be raised on appeal since it was never settled in either the Circuit Court or the Supreme Court. The question concerns lower courts' independent obligation to dispose of the question of lack of subject-matter jurisdiction before proceeding to the merits of the case. In United States v. Corrick, 298 U.S. 435, 440 (1936), this Court held that lack of subject-matter jurisdiction cannot be waived by the parties; therefore, the Court must upon the appeal examine the contention. However, the sua sponte dismissals of the consolidated appeals thwarted a review of this claim. Although the record on appeal as it stands is sufficient for this Court to examine this contention, the record is inadequate for a review of other contentions.

The second conflict, which the court below expressly created in its order denying the petition for a writ of mandamus (Appendix A), concerns whether a mandamus is appropriate for seeking relief from post-judgment orders that deprives litigants of a sufficiently complete record on appeal so that their brief can be filed in compliance with the rules of the court requiring that each contention be supported by evidence in the record on appeal. Or, whether litigants can avoid dismissal of their appeals or affirmation of the judgment by proceeding with their appeal with a wholly inadequate record, and then seek review of the issue of securing a sufficiently complete record within the brief, as suggested by the Supreme Court's decision (Appendix A).

The conflict that encompasses the above issues and broadly covers the extent of this petition for a writ of certiorari is whether the principle in Griffin v. Illinois, 351 U.S. 12, 16 (1956) is applicable in civil actions, as in the present case, where this Court held that equal justice mean

providing the record needed to pursue appeals to all litigants, the poor and the rich, the weak and powerful alike — after having establish avenues of appellate review.

The last of the conflicts concerns whether the Supreme Court abused its discretion by entering a sua sponte order dismissing the consolidated appeals.

In quoting this Court in Baltimore & O.R. Co. v. U.S., 386 U.S. 372, 431 (1967): "Obviously, without all the relevant facts, the chance of a satisfactory disposition is diminished."

Therefore, in order to decide the constitutional questions on the grounds asserted for the allowance of certiorari herein, an adequate record on appeal is required, to which the state courts have barred the petitioners-appellants from acquiring. Hedgebeth, supra, 334 U.S. 806.

REASONS FOR GRANTING THE PETITION

Few issues could be more important than the issues in this case of a state-court's blatant act of bolting the door to equal justice. Griffin v. Illinois, 351 U.S. 12, 24 (1956). At stake is the rights this Court has highly prioritized as sheltered by the Fourteenth Amendment, specifically, the right to due process and equal access to the courts of this great nation.

The Supreme Court's decisions at issue poses a clear and present danger to these rights, and must be corrected forthwith to ensure that all persons not be deprive of the right of appellate review once a court affords that right. And, that all persons be afforded the right of appellate review upon satisfying the jurisdiction of the appellate court.

The courts of this great nation have confronted, in diverse settings, the "age old problem" of "providing equal justice for poor and rich, weak and powerful alike." Griffin, ibid, at p. 16. In addressing access to appeals in general, and the right to the record needed to pursue

appeals in particular, Griffin, ibid., is the foundation case. M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996).

The petitioners-appellants are unable to fathom why the Supreme Court would deny their right to a sufficiently complete record on appeal — especially since the petitioners have paid for the requested documents and papers that exist in the files of the Circuit Court. Even more questionable is why the Supreme Court denied their request made in the alternative, to supplement/augment the record on appeal with the true and correct copies of the documents and papers that were identified as omitted from the record and that were duly filed by the petitioners-appellants in the Supreme Court, particularly since the respondents did not oppose the petitioners-appellants' requests to correct the omissions of the record on appeal.

The petitioners-appellants would like to think that this is a case of an arbitrary denial of an appellate review of the proceeding in the Circuit Court; but find when the obvious violations of their Due Process and Equal Protection rights are considered and factored in with the fact that the Honorable Samuel Welch, the judge presiding over the proceedings in the Circuit Court, was a candidate for the Alabama Court of Criminal Appeals, it still remains that the petitioners-appellants were deprived of their constitutional rights guaranteed under the Fourteenth Amendment. [4]

The petitioners-appellants contend that no person is entitled to the protection of the U.S Constitution unless he/she is vigilant in its preservation and application. And, the petitioners-appellants further contend that Alabama misapplied the constitutional safeguards of the Fourteenth Amendment of the U.S. Constitution in this case from the onset of the respondents' complaint by Circuit Judge

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[4] On November 7, 2006, the Honorable Samuel Welch was elected to the Alabama Court of Criminal Appeals.

Samuel Welch prejudging the petitioners-appellants appearing in pro se and predetermining the case.

For example: Despite petitioner-appellant Claxton N. Welch's timely filed answer to the respondents' complaint, the Circuit Court entered an erroneous order finding that he was in default. Thereafter, the petitioners-appellants filed Temporary Restraining Orders ("TRO") to enjoin the respondents from selling the lands. However, the Circuit Court summarily denied the TRO and executed the sale of the real property, despite not having acquired jurisdiction of the subject-matter, i.e., the lands belonging to the probated estate.

After the sale of the land, the petitioners-appellants timely filed their objections to the sale and a noticed hearing for their objections was set for March 23, 2004. And, it was at this juncture of the case that the petitioners-appellants realized that the Circuit Court had pre-judged them because of their in pro se appearance in the action and that the protection of the Constitution afforded to other in pro se litigants would not be applied in this case. (See pp. 15–17 of this writ petition and fn 7.)

The Circuit Court vacated its order for this "first" sale of the lands by ignoring all the grounds asserted by the petitioners-appellants, except holding that the respondents failed to follow the probate statute governing procedures for publishing the sale notice. The Circuit Court failed to dispose of the lack of subject-matter jurisdiction and continued to preside on the case with virtually all of the activities in the Circuit Court being indicative of its anti-pro-se bias and can easily be found in the record that the state-courts refused to be made part of the record on appeal.

A "second" order for the sale of the lands was entered a couple months later. The petitioners-appellants were, again, ready to oppose this sale, but on the day set for the sale the Circuit Clerk arbitrarily self-declared the day to be

"Confederate Holiday" and closed the public Circuit Court and called the sale off.

The petitioners-appellants also contend that an improper conspiracy between Circuit Judge Samuel Welch and the respondents (the plaintiffs in the underlying civil action) to predetermine the outcome of the judicial proceeding existed. As the case continued petitioner-appellant Claxton N. Welch filed a motion seeking the recusal of Circuit Court Judge Samuel Welch, under Canon 3C(1) of the Alabama Canons of Judicial Ethics (Appendix E, p. 12), on the ground that 1) Circuit Court Judge Samuel Welch's impartiality might reasonably be questioned, and 2) the circuit judge is possibly related to the petitioners-appellants within the fourth degree of consanguinity or affinity. As evidenced in the record, Circuit Judge Samuel Welch denied the motion seeking his recusal without an explanation.

A "third" and the last order to sale the land was entered in August 2004 by Circuit Judge Sam Welch which effectively sold the probated estate's lands to a predetermined buyer, John Tope (a non-party and client of the respondents' attorney) for a predetermine price. This case boils down to inappropriate and unconstitutional acts between Circuit Judge Samuel Welch, the Circuit Clerk, and the respondents.

The question of the resulting sua sponte order dismissing the consolidated appeals in this case cannot be ignored when the petitioners-appellants seek review by this Court on the ground of a deprivation of rights guaranteed under the Fourteenth Amendment sufficient to oust the appellant court of its jurisdiction to enter the dismissal and affirm the judgment in the first instance.

I. Review Is Warranted In This Case Because The Decision Below Is A Final Judgment And This Court Has An Independent Obligation To

Determine Whether Subject-Matter Jurisdiction Exists

This writ petition begins with the conflict the petitioners-appellants believe to be dispositive, namely, whether the Circuit Court had acquired subject-matter jurisdiction over the lands belonging to the probated estate under the jurisdiction of the Probate Court.

To be reviewable by this Court, the state-court judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as effective determination of litigation and not of merely interlocutory or intermediate steps therein. 28 U.S.C. § 1257(a). A state-court decision is not final unless and until it has effectively determined the entire litigation. Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548, 551 (1945).

From the outset of the present case, the petitioners-appellants raised and challenged the defect of the Circuit Court's lack of subject-matter jurisdiction and continued such objections in the post-judgment proceedings in the Supreme Court; and even filed, on September 23, 2004, a petition for writ of mandamus in the Alabama Civil Court of Appeals seeking a determination as to whether the Circuit Court was without subject-matter jurisdiction. This writ petition was later transferred to the state's highest court, and on October 5, 2004, the Supreme Court dismissed said writ petition on the ground it was not served on the respondent, Circuit Judge Samuel Welch, despite evidence to the contrary.

As this Court decided in United States v. Cotton, infra, "subject-matter jurisdiction, because it involves the court's power to hear a case, can never be forfeited or waived." United States v. Cotton, 535 U.S. 625, 630 (2002). Further, this Court also decided that "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a

challenge from any party. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999).

Therefore, a final judgment has been entered, without disposing of the subject-matter jurisdiction, and is a final determination of the underlying litigation.

A. Statutory Requirement of Subject-Matter Jurisdiction And Prejudgment Of Pro Se Litigants

The Alabama statute (Alabama Code § 12-11-41)[5] does not allow the Circuit Court to take jurisdiction over the administration of a probated estate without a court order from the Probate Court, as authorized by the heirs of the probated estate. The petitioners-appellants contend that even if it did, such an exercise of jurisdiction would be inconsistent with the Due Process Clause of the Fourteenth Amendment because the validity of an order of a court depends upon that court's having jurisdiction over both the subject matter and the parties. Stoll v. Gottlieb, 305 U.S. 165, 171 – 172 (1938), cited in Insurance Corp. v. Compagnie Des Bauxities, 456 U.S. 694, 701 (1982).

In the present case, first, no mandatory order required under Alabama Code 1975 § 12-11-41 was rendered or entered in the underlying civil action, as evidenced by the Circuit Court's own docket sheet generated as of April 29, 2005, (known as the "Case Action Summary Sheet"). Therefore, the Circuit Court did not acquire subject-matter jurisdiction. [6]

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[5] Alabama Code 12-11-41 reads in relevant part as follows: "The administration of any estate may be removed from the probate court to the circuit court at any time before a final settlement thereof, by any heir, devisee, . . .; and an order of removal must be made by the court . . ." (Alabama Code 1975 § 12-11-41) (emphasis added)

[6] Because the mandatory order required under Alabama Code §12-11-41 is not listed on the Circuit Court's Case Action Summary, this is proof that such a mandatory order was not rendered by the Probate

Second, in Circuit Judge Samuel Welch's order entered on July 5, 2005, which denied the petitioners-appellants' motion to correct the record on appeal, he concedes to having not acquired jurisdiction pursuant to Alabama Code § 12-11-41 by holding that "parts of the probate court record are not a part of the circuit court filed in this case". (Appendix D, p.7)

Lastly, further evidence of the lack of subject-matter jurisdiction can be found in the reporter's transcript for the March 23, 2004, proceeding on the petitioners-appellants' motions made in the Circuit Court objecting to the "first" sale of the probated estate's real property. Petitioner Gaye Welch-Brown questioned Circuit Judge Samuel Welch to ascertain his understanding of Alabama Code §12-11-41 requiring a mandatory order to permit the transfer of the probated estate's land to the jurisdiction of the Circuit Court.

28 U.S.C. §1654 states "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." Therefore, any intentional discrimination, by Judge Samuel Welch against the pro se litigants in this present case (whether by choice or forced to be so) is a violation of this Federal Statute (as well as Section 10 of the Alabama Constitution).

The following colloquy took place at the March 23, 2004, proceeding that clearly suggest that the petitioners-appellants, in pro se, were discriminated against. [7]

Court; therefore, the Circuit Court lacked subject-matter jurisdiction. The relevant Case Action Summary was made part of the record on appeal and is located in the Clerk's Transcript pages 813 -820 and 884 – 897.

[7] The Reporter's Transcript for the March 23, 2004, proceeding was made part of the record on appeal and is located in said record at pages 28 – 29. "THE COURT" is the Hon. Samuel Welch, judge presiding.

THE COURT: -- but you ought to talk to a lawyer who knows Alabama law before you start making these statements which are wrong. I'm sorry. I'm not trying to be mean. I'm talking to you as gently as I know how, but the things you are saying are not in accordance with what Alabama law is. And if you're serious about this, just go hire a lawyer.

MRS. WELCH-BROWN: We have another issue that was before the Court also in this objection. And if you –

MR. NIX: Judge, you've granted – you've sustained their objection in order for it to be resold, I don't know what the point –

THE COURT: They don't want it sold at all. That's the point. Go ahead.

MRS. WELCH-BROWN: Alabama Code § 12-11-41 requires that a court order from the probate court be issued specifying that the estate of L.L. Welch would be removed from the probate court to the circuit court. There's no order.

THE COURT: They don't require that, and I haven't removed the estate, I don't think. I don't think I have that estate.

MRS. WELCH-BROWN: No, you don't. There's no order. Absolutely no court order.

THE COURT: Again, it's just not required, ma'am. And I suggest that if you're serious about this thing that you hire a lawyer –

MRS. WELCH-BROWN: A court order is not required?

THE COURT: It has not been removed. There's no need to remove a case in order to assume land that's been passed by will.

MRS. WELCH-BROWN: Correct?
THE COURT: It's just not done. It doesn't need to be done. And, again, if you're serious about this matter, I really suggest – I mean, you traveled all the way from California; right?
(See fn 7)

"Since lack of jurisdiction of a (federal) court touching the subject matter of the litigation cannot be waived by the parties, we must upon this appeal examine the contention; and, if we conclude that the District Court lacked jurisdiction of the cause, direct that the bill be dismissed." United States v. Corrick, 298 U.S. 435, 440 (1936).

Without this Court's resolution of this conflict, state courts will continue to breach its duty to dispose of subject-matter jurisdictional issues before continuing to proceed to the merits of the case.

II. Review Is Warranted In This Case Because The State Courts' Decisions Refusing Litigants An Opportunity To Secure A Sufficiently Complete Record On Appeal Conflicts With This Court's Precedent Principle of Fair Access To The Judicial Process

The Supreme Court's ruling on the underlying petition for writ of mandamus (Appendix A), and the ensued denial of the application for rehearing (Appendix C), decided the last avenue available to the petitioners-appellants to challenge the lower courts' decisions repeatedly refusing to correct the omissions of the record on appeal so that a proper appellate consideration of their claims can be made.

As discussed below, the decisions of the Supreme Court conflicts with precedents of this Court regarding the equal protection and due process clause of the Fourteenth Amendment.

In serious conflict with the precedent Lindsey, et al. v. Normet, et al., 405 U.S. 56, 77 (1972), in the present case

the state courts' decisions barred the petitioners-appellants from having a sufficiently complete record on appeal for presentation of their contentions to the appellate tribunal, contrary to the rights assured them by this Court's decision in Griffin, supra.

This question is further framed by the facts in the foregoing "Statement of Facts."

A review by this Court is warranted in this case because the petitioners-appellants have been denied the equal protection of the laws, denied due process of law, and have been denied privileges and immunities of citizens of the United States.

A. Equal Protection Of The Law

In the foundation case of Griffin, supra, 351 U.S. 12, 18 (1956), this Court has recognized that when an appeal is afforded, as in the present case, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. Griffin, supra; Gardner v. California, 393 U.S., 367, 370 (1969).

In Lindsey, et al., supra, 405 U.S. 56, 77, this Court referred first to precedent recognizing that, "if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review." Id., at p. 77. The Court further stated that "[w]hen an appeal is afforded, . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." Ibid.

On March 8, 2005, the petitioners-appellants filed their respective notices of appeals in the Circuit Court, which were immediately docketed in the Supreme Court; hence, Supreme Court granted the appeals of the petitioners-appellants and, thus, acquired jurisdiction. Thereafter, the petitioners-appellants remitted payment to the Circuit Court

for the purchase of one copy of the so-called complete record on appeal. Upon receiving the record on appeal, the petitioners-appellants discovered that the record was insufficient in that the Circuit Clerk failed to provide many of the designated documents and papers, for which payment was advanced.

In Lane v. Brown, 372 U.S. 477, 483 (1963), this Court reaffirmed the fundamental principle of Griffin, ibid, at p. 19, that "Destitute defendants 'must be afforded as adequate appellate review as defendants who have money enough to buy transcripts'." This principle is no less applicable where, as in the present case, the petitioners-appellants have advanced the money to pay for the documents, papers, and transcripts necessary for an adequate appellate review.

This Court held impermissible in the Griffin case, ibid, where a State granted appeals (in criminal cases) but in practical application denied effective appellate review (to indigents). Gardner, supra, 393 U.S. 367, 370. Again, this principle is no less applicable where, as in the present case, the respondents' complaint is a civil action.

The petitioners-appellants contend that Alabama's decision has departed from its own accepted and usual course of judicial proceedings governing requests to correct the omissions of the record on appeal, and stands in direct conflict with this Court's holding in Griffin supra. In addition, the Supreme Court's departure from the accepted and usual course of judicial proceeding, in essence has also sanctioned the Circuit Courts' departure from such a proceeding.

Alabama explained the rational of requiring that it is the duty of the appellants to assure that the record on appeal are sufficient and complete by holding in Vaughn v. Britton, 740 F.2d 833, 835 (11th Cir. Ala. 1984) that "[A]lthough the rule confers some discretion on the appellate court to correct an incomplete record, the burden

still remains on the parties to submit a complete and accurate record." [8] Vaughn, ibid., at p. 835.

Alabama's decision refusing to allow the petitioners-appellants a sufficiently complete record on appeal violates the equal protection clause of the Fourteenth Amendment and conflicts with the Griffin principle, supra, the foundation for adjudication of the issue of access to appeal in general and the record needed to pursue appeals in particular. ***Alabama's decision in actual effect singles out the petitioners-appellants, in that it mandates that appellants are responsible for securing a sufficiently complete record on appeal, but at the same time bars the petitioners-appellants in this present case from securing the required record as evidences by the repeated refusals the state courts herein.***

In citing this Court's precedent Shelley v. Kraeme, infra, "[T]he task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly. Where, however, it is clear that the action of the State violates the terms of the fundamental charter, it is the obligation of this Court so to declare." Shelley v. Kraemer, 334 U.S. 1, 23 (1948).

B. Due Process Of The Law

In the foundation case of Griffin, supra, 351 U.S. 12, 18 (1956), this Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review. But if an appeal is afforded, as in this present case, Alabama must not so structure it as to arbitrarily deny to some persons the right or privilege available to others, as the results in this present case.

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[8] All references to "Rule" pertain to the Alabama Rules of Appellate Procedures, unless otherwise stated.

"Due process requires that there be an opportunity to present every available defense." American Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932). As stated by this Court in M.L.B., infra, the due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action. M.L.B., supra, 519 U.S. 102, 110.

The petitioners-appellants contend that the Supreme Court's decision deprived them of a sufficiently complete record on appeal, resulting in them not being afforded the opportunity to present every available defense to their contentions, as granted to other litigants.

1. The Supreme Court's decision impedes open and equal access to the judicial process.

Rule 10(f) confers some discretion on the Supreme Court to correct an incomplete record, but the burden still remains on the petitioners-appellants to submit a complete and accurate record or to call the lower court's attention to any omission by a motion under this section. Vaughn v. Britton, supra, 740 F.2d 833, 835. In the present case, the petitioners-appellants persistently argued that they were responsible for bearing the burden of ensuring that the record contains sufficient evidence to warrant a reversal, but to no avail.

It is well settled that the discretion in the Supreme Court to correct a trial record on its own motion is to be exercised, if at all, only in rare circumstances. Vaughn, ibid. at p. 835. In this present case, it is apparent that the aforementioned discretion of the appellate court was not among the rare times it was exercised.

Relying on this Court's decision in Rinaldi, supra, 384 U.S. 305, 310, the petitioners-appellants contend that they were deprived of their Fourteenth Amendment right ***because other paying litigants are afforded open and equal access to the courts by allowing them to have a sufficiently complete record to support their contentions***

on appeal, while Alabama discriminates against the similarly situated petitioners-appellants by barring their right to the same by sua sponte dismissing their consolidated appeals, infra.

Like federal procedures, the Supreme Court would not disturb Circuit Judge Samuel Welch's finding (Appendix D) that obviously impeded the petitioners-appellants' ability to prepare and file their brief in compliance with Alabama rules and procedures. [9]

The ***Alabama*** Supreme Court in Trimble, infra, dismissed the appeal holding that "[B]ecause it is the obligation of the appellant to see that the record on appeal contains evidence sufficient to warrant reversal, Trimble must bear the strict penalty for omission of this vital material." Trimble v. City of Prichard, 438 So. 2d 745, 747 (Ala. 1983).

Like Trimble, in the following year Alabama held that " . . . it is the duty of the appellant to perfect his appeal by seeing that a complete record is filed in the appellate court which reflects the points upon which he seeks review. We are bound by the record and cannot consider matters contained in briefs which is not on the face of the record." Vaughn v. State, 347 So. 2d 582, 584 (1984).

Rule 1 confirms that Alabama's Rule 10(f) must be construed to permit appealing litigants, inter alia, a just determination on the merits of their claims. Despite this clear, and pre-existing, legislative directive, in this present case, the state courts' decisions preclude the petitioners-appellants from obtaining a sufficiently complete record on appeal, as afforded other litigants that, too, made advance payments for the designated documents and papers.

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[9] Although Fed. Rules Civ. Proc. 10(e) grants the court of appeals the authority and jurisdiction to correct the record, it generally will not disturb the circuit court's finding that the record is correct. (Abatino v. US., 750 F.2d 1442, 1444 (9th Cir. 1985))

Alabama could not have been more direct and poignant on the issue of the prerequisite to a sufficiently complete record on appeal than it is in the above-mentioned cases and the expected Alabama's conclusion if the petitioners-appellants had filed their brief in non-compliance with Rule 28(e).

Analogous to Alabama's procedure, "[T]he petitioners-appellants are responsible for ensuring that the court has an adequate record from which to review the claims of error and the case. The failure to provide such a record would result in dismissal of the appeal." Syncom Capital Corp. v. Wade, 924 F.2d 167, 169-170 (9th Cir. Cal. 1991).

Without this Court's resolution of this conflict, States will continue to ignore the issue of whether the appellate rules can be applied so as to impede open and equal access to the state courts and deprive litigants of an opportunity to present every available defense in their consolidated cases.

III. Review Is Warranted In This Case Because Having Established Appeal Procedures, Alabama Cannot Condition Its Availability To Appellants Upon State-Created Obstacles To The Exercise Of A State-Created Right To Appeal From An Adverse Decision In Pre-Judgment And Post-Judgment Proceedings

In purpose and effect, Alabama's procedure governing dismissal for failure to prosecute is not dissimilar to the federal rule in that dismissal for want of prosecution summons the judge to a high degree of judicial discretion, and such dismissal will be reversed only for abuse. Fed. Rules Civ. Proc., Rule 41(b), 28 U.S.C.A.

This Court in Link v. Wabash R.R. Co., infra, held that "[M]ere lapse of time does not warrant dismissal when the plaintiff has been diligent throughout; speed simply for the sake of speed is not the purpose to be served." Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962). Further, in

Link this Court makes plain, whether there has been a "failure to prosecute" is to be determined upon a consideration of all pertinent circumstances. Fed. Rules Civ. Proc. Rule 41(b), 28 U.S.C.A. Link, ibid.

On July 20, 2006, the Supreme Court entered a sua sponte order dismissing the consolidated appeals for failure to prosecute. (Appendix B)

On August 2, 2006, the petitioners-appellants challenged the dismissal order by filing in the Supreme Court a motion seeking relief from the sua sponte order. On August 16, 2006, the Supreme Court denied this motion along with denying a discretionary review of the petitioner-appellants' application for rehearing (of the writ of mandamus petition. (Appendix C) This action resulted in the Supreme Court successfully and effectively bolting the door to equal justice. (Appendix B)

Because dismissal for want of prosecution is an undeniably harsh sanction, having the procedural effect of an adjudication on the merits against the petitioners-appellants, the issue of whether there has been a failure to prosecute under the rule allowing such a dismissal can only be made with a sufficiently complete record on appeal, which in this present case the state courts have barred from the proceeding, as discussed supra. Fed. Rules Civ. Proc., Rule 41(b), 28 U.S.C.A.

A. The Dismissal Sua Sponte Of The Consolidated Appeals Is An Abuse Of Judicial Discretion

Quoting Alabama's very own philosophical overview of Rule 1, "Procedural traps will not deprive a litigant of his right to have a determination on the relative merits of the

appeal." (West's Alabama Rules of Court, Alabama Rules of Appellate Procedure Appendices, Appendix IV. [10]

In applying the principles in Rule 1 — which were enacted to the extent allowed by the Due Process Clause of the Fourteenth Amendment — to the present case, the sua sponte order dismissing the consolidated appeals has effectively bolted the door to equal justice for the petitioners-appellants in that this procedural trap is in effect is an adjudication on the merits (against the petitioners-appellants) of the respondents' complaint without affording the petitioners-appellants their day in the appellate court.

Analogous to Rule 28(e), Rule 28(a)(7) of the Federal Rules of Appellate Procedure also requires that the appellant's brief must contain a statement of facts relevant to the issues submitted for review with appropriate references to the record. Fed. R. App. P. 28(a)(7). Han Giok Han v. Stanford University, et al., 210 F.3d 1038, 1039 (9th Cir., Cal. 2000).

The federal court in Perez, infra and Lowery, infra, held that briefing inadequacies, the failure to present a sufficient record can itself serve as a basis for summary affirmance. Perez v. Perez, 30 F.3d 1209, 1217-18 (9th Cir. 1994); Lowery v. United States, 258 F.2d 194, 196 (9th Cir. 1958). Similar rulings are endless in count, in Dela Rosa, infra, the federal court held that "[S]ince appellant has seen fit to proceed with his appeal on the wholly inadequate record we have described, the judgment must be and is affirmed", or for a dismissal of the appeal, Dela Rosa v. Scottsdale Memorial Health Systems, Inc., 136 F.3d 1241, 1243 n.1 (9th Cir. Ariz. 1998).

In purpose and effect, Alabama's procedure governing dismissal for failure to prosecute is not dissimilar to the

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[10] Source: West 's Alabama Rules of Court, Alabama Rules of Appellate Procedure Appendices, Appendix IV. Overview of Alabama Rules of Appellate Procedure, 2004.

federal rule. Even if the petitioners-appellants had proceeded with their consolidated appeals on the wholly inadequate record on appeal, contrary to the Alabama law and procedure, the consolidated appeals would have been dismissed or the judgment affirmed adverse against them anyway. (Appendix B)

The Ninth Circuit, Eleventh Circuit, and all the other federal circuit courts have held that insufficient, inadequate, incomplete records on appeal are grounds for dismissal of the appeal or affirmation of the judgment. Vaughn v. Britton, 740 F.2d 833, 835 (11th Cir. Ala. 1984). Dela Rosa, ibid. Relying on these cases, the petitioners-appellants' brief would still have been dismissed (and the judgment affirmed) if they had filed their brief contrary to the rules of Alabama.

As evidenced in the courts below, there is a clear record showing that the petitioners-appellants' good faith and efforts to comply with Rule 28(e), coupled with the evidence showing that there was no delay or contumacious conduct by the petitioners-appellants, does not warrant the Supreme Court's sua sponte dismissal of their consolidated appeals.

There is no evidence that the drawn-out history of the appellate proceeding for this case was due to the petitioners-appellants deliberately proceeding in a dilatory fashion. In fact, the contention as stated herein is that but for the state courts' refusal to allow the petitioners-appellants the opportunity to correct the omissions of the record, the petitioners-appellants were prevented from filing their appellants' brief in compliance with Rule 28(e) and by the multiple extensions of time granted by the Supreme Court to file the brief — and not to willfulness, bad faith, or any fault of their own.

The record and the necessary corrections of the omissions from the record will show that during the entire period of time from the docket of the notices of appeals, on

March 8, 2005, through the order dismissing the consolidated appeals (Appendix B), entered on August 16, 2006, motions and activities of various kinds by the petitioners-appellants and the state courts, were taking place in almost every month during the appellate proceeding. It would be impossible for the petitioners-appellants to be accused of delay in the consolidated appeals of the case. If responsibility is to be placed upon anyone for the alleged delay, it must be placed upon the judicial system because Rule 1 (and the Federal version) was intended that decisions on procedural matters, such as the matter of correcting the omissions of the record on appeal, should be based on considerations of what would be the least time-coming, the least expensive, and the most just. Rule 1.

The petitioners-appellants were doing the best they could to file their brief in compliance with Rule 28(e) so that they may demonstrate that the points to be raised on appeal were adequately preserved in the Circuit Court and avoid the current fate of their consolidated appeals, i.e, dismissal.

The petitioners-appellants contend that it appears to be an unequal justice that would punish them by dismissing their consolidated appeals for failure to prosecution which undoubtedly the dismissal was due entirely to the Alabama's judicial system depriving some litigants, like the petitioners-appellants, of their constitutional rights under the Fourteenth Amendment, while granting these rights to other litigants. Surely, it would have been the least time-consuming, the least expensive, and the most just if the Supreme Court would have exercised its discretion, as authorized under Rule 10(f), and rendered the necessary order directing the Circuit Court to correct the omissions of the record on appeal; or, better yet in the alternative, grant the petitioners-appellants' motion to utilize their alternative filing of true and correct copies of the designated omitted

documents and papers to correct/supplement the record on appeal. The petitioners-appellants further contend that the sua sponte order of dismissal for failure to prosecute was rendered for no purpose other than to defeat their obvious actively prosecuted appeal.

Quoting this Court in Link v. Wabash Railroad Co., supra, 370 U.S. 626, 648: "When we allow the desire to reduce court congestion to justify the sacrifice of substantial rights of the litigants in cases like this, we attempt to promote speed in administration, which is desirable, at the expense of justice, which is indispensable to any court system worthy of its name." Link, ibid.

Without this Court's resolution of this conflict, States will continue to ignore the issue of whether it can create procedural traps that require litigants to proceed contrary to the appellate rule so that the State may promote speed in the administration of the court by dismissing appeals at the expense of affording justice to all litigants.

B. The Appellate Court's Refusal To Docket The Related Second Notice Of Appeal, Which Was Appealing The Post-Judgment Order Refusing To Correct The Record On Appeal, Violates The State's Own Constitution and the Fundamental Right To Access To Any Judicial Tribunal In The State

Although Section 10 of the Alabama Constitution was enacted on the principles of the Fourteenth Amendment, , the Supreme Court's decision conflicts with the Fourteenth Amendment that makes it clear that it is prohibited from bolting the door to equal justice to all persons, including those like the petitioners-appellants appearing in pro se.

On November 21, 2005, the petitioners-appellants filed, respectively, another notice of appeal, and the required docket fees, in the Circuit Court (and made an advance payment to the court reporter for the transcripts of the

proceedings). These second notices of appeal were from the post-judgment order entered on July 5, 2005 (Appendix D), and the post-judgment order deemed denied on November 2, 2005, because the circuit judge failed to timely dispose of the matter. Although pertaining to the same civil action of the respondents, these post-judgment motions and orders were not made part of the record on appeal, as requested by the petitioners-appellants.

The Circuit Clerk immediately transmitted the second notices of appeal and the docket fees to the Supreme Court. However, the Supreme Court failed to docket these second notices of appeal and the fees, without an explanation.

On December 14, 2005, the petitioners-appellants filed in the Supreme Court a motion seeking to have the second notices of appeal entered on the court's dockets of the relevant consolidated appeals. The Supreme Court failed to docket this motion until several months after December 14, 2005, after noticeable alterations and manipulation to the docket sheets were brought to the clerk's attention.

The petition for writ of mandamus at issue herein sought a writ to be issued under the seal of the Supreme Court commanding, inter alia, the Circuit Clerk to correct/supplement the record on appeal by certifying and transmitting to the Supreme Court the omitted documents and the relevant reporter's transcripts. Or, in the alternative, order that the record on appeal be corrected/supplemented with the exhibits filed by the petitioners-appellants in the Supreme Court on March 11 and 18, 2005, and the omitted reporter's transcripts.

In Yick Wo, infra, this Court held that law and court procedures that are "fair on their faces" but administered "with an evil eye or heavy hand" was discriminatory and violates the Equal Protection clause of the Fourteenth Amendment." Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).

The related second notices of appeal, and docket fees, were never docketed in the Supreme Court; thereby depriving the petitioners-appellants of the fundamental right to equal access to the Supreme Court, particularly since the State had established the avenue for appeals and granted the petitioners-appellants' notices of appeal filed on March 8, 2005. Rinaldi, supra, 384 U.S. 305, 310.

In Shelley, infra, this Court held as follows: "And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." Shelley, supra, 334 U.S. 1, 20.

The task of determining whether the action of a State offends constitutional provisions is one which can not be undertaken lightly. Without resolution of this conflict by this Court, States will continue to ignore the issue of whether the principles of open and equal access to state courts are limited to direct appeals, and not extended to related post-judgment proceedings and related subsequent notices of appeals.

CONCLUSION

The petition for writ of certiorari should be granted.

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APPENDIX A

IN THE SUPREME COURT OF ALABAMA
July 20, 2006

1051467
Ex parte Gaye Welch-Brown and Claxton N. Welch, Jr.
PETITION FOR WRIT OF MANDAMUS: CIVIL (In re: William H. Bell, II et al. v. Robert L. Welch et al.) (Conecuh Circuit Court: CV-03-75).

ORDER

The petition for a writ of mandamus to be directed to the Honorable Samuel H. Welch, Jr., Judge of the Circuit Court of Conecuh County, Alabama, having been duly filed and submitted to the Court,

IT IS ORDERED that the petition for a writ of mandamus is denied, for seeking relief not available by mandamus. Rule 21, Ala. R. App. P.' Ex Parte Drill Parts & Serv. Co., 590 So. 2d 252 (Ala. 1991).

Nabers, C.J., and See, Lyons, Harwood, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 20th day of July, 2006
s/ Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX B

IN THE SUPREME COURT OF ALABAMA
July 20, 2006

1040813
Gaye Welch-Brown v. William H. Bell, II and Louis Welch Bell (Appeal from Conecuh Circuit Court: CV-03-75).

1040814
Claxton N. Welch, Jr. v. William H. Bell, II and Louis Welch Bell (Appeal from Conecuh Circuit Court: CV03-75).

ORDER

IT IS ORDERED that the appeals are dismissed for failure to prosecute.

IT IS FURTHER ORDERED that the costs be taxed against the appellants as provided by Rule 35, Alabama Rules of Appellate Procedure.

Nabers, C.J., and See, Lyons, Harwood, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 20th day of July, 2006
s/ Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX C

IN THE SUPREME COURT OF ALABAMA
August 16, 2006

1040813
Gaye Welch-Brown v. William H. Bell, II and Louis Welch Bell (Appeal from Conecuh Circuit Court: CV-03-75).

1040814
Claxton N. Welch, Jr. v. William H. Bell, II and Louis Welch Bell (Appeal from Conecuh Circuit Court: CV03-75).

1051467
Ex parte Gaye Welch-Brown and Claxton N. Welch, Jr. PETITION FOR WRIT OF MANDAMUS: CIVIL (In re: William H. Bell, II et al. v. Robert L. Welch et al.) (Conecuh Circuit Court: CV-03-75).

ORDER

IT IS ORDERED that all pending motions and/or petitions in the above-referenced cases are denied.

Nabers, D.J., and See, Lyons, Harwood, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 16th day of August, 2006
s/ Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX D

IN THE CIRCUIT COURT OF CONECUH COUNTY, ALABAMA

William H. Bell, et al., *
Plaintiffs * Case Number CV 2003-075
vs. *
Robert L. Welch, et al., * (July 5, 2005
Defendants * George Hendrix, Clerk
Conecuh County
Filed)

ORDER

The Defendant Claxton Welch filed a motion to correct the record with regard to the following items:

Item 1	Final Judgment Order	Jan. 25, 2005
Item 2	Supplement to Defendant/Counterclaimant Claxton N. Welch's Objection to Sale of Property (filed 8/20/04)	August 20, 2004
Item 3	All Circuit Court Orders/Rulings/Judgments, including: Ruling for – Order/Judgment Denying Welch Brown's Motion to Intervene, Deeming Gaye Welch-Brown's Objection to Sale of Property Moot and Confirming the Sale of Property	Sept. 28, 2004
Item 4	Ruling for – Order/Judgment Denying Claxton Welch's Objection to Sale of Property; and Supplement	Sept. 28, 2004

APPENDIX D, cont.

Item 5	Gaye Welch-Brown's Motion to Vacate September 28, 2004 Judgment Denying Motion to Intervene, Deeming Gaye Welch-Brown's Objection to Sale of Property Moot and Confirming the Sale of Property and to Vacate all Orders	Oct. 26, 2004
Item 6	Notice of Trial Setting	unknown
Item 7	All probate Court of Conecuh County Order/Rulings/Judgments, including: Order Removing Estate of L.L. Welch from Probate Court to Circuit Court	June 25, 2003 or earlier

His motion is not well taken and is denied for the following reasons. Gaye Welch Brown is not a party to this case.

(a) With regard to item 1, There was an order finding that the land could not be partitioned in kind and authorizing a sale of the property and an order confirming the sale of the property. Each is in the file.

(b) With regard to item 2, this matter can be found in Volume II, at page 346.

(c) With regard to items 3 and 4. The court ruled orally on the record. These rulings can be found in Volume V, at pages 56-57.

(d) With regard to item 5, The court ruled orally on the record. This ruling can be found in Volume V, pages 56=57 and in Volume V, at page 878.

APPENDIX D, cont.

(e) With regard to item 6, this matter can be found in Volume I, at page 104.

(f) With regard to item 7, parts of the probate court record are not a par of the circuit court file in this case.

Done this the 28th day of June, 2005.

s/ Sam Welch, Judge

7-5-05
Supreme Court
atty
G. Welch-Brown
Claxton Welch

APPENDIX E

Alabama Rules of Appellate Procedure, Rule 1 provides as follows:

> These rules govern appeals to the Supreme Court, the Court of Civil Appeals, and the Court of Criminal Appeals, and proceedings on petitions for writs or other relief which these courts or judges thereof are empowered to grant. All cases appealable to the Court of Criminal Appeals shall be governed by those rules contained herein which are applicable to appeals to that court; and, pre-trial appeals by the state in criminal cases shall be governed also by the rule of criminal procedure providing for such appeals. These rules shall not be construed to extend or limit the jurisdiction of these appellate courts as established by constitution or law. They shall be construed so as to assure the just, speedy, and inexpensive determination of every appellate proceeding on its merits.

Alabama Rules of Appellate Procedure, Rule 10(f) provides as follows:

> If admitted or offered evidence that is material to any issue on appeal is omitted from the record after being designated for inclusion as required in Rule 10(b), or if any question arises as to whether the record correctly reflects what occurred in the trial court and the parties cannot stipulate what action should be taken to supplement or correct the record, the appellant or the appellee may file with the trial court a motion to supplement or correct the record on appeal; provided that, if a party is seeking to have included in the record a transcript of proceedings that was omitted from the reporter's transcript, the party must file with the motion copies of the transcript purchase order as proof that the omitted portions were originally requested as required by Rule 10(b). any party filing a motion with the trial

APPENDIX E, cont.

court pursuant to this rule shall file a copy of the motion with the clerk of the appellate court and shall serve a copy on the appropriate court reporter, if the reporter's transcript is to be supplemented or corrected, and on all other parties. Within 14 days (2 weeks) after the filing of a motion pursuant to this rule or after the parties have stipulated as to what action should be taken, the trial court shall enter such orders as are necessary to ensure that the record is complete and that it conforms to the truth. Failure by the trial court to rule on any motion filed in accordance with this rule within that 14-day (2-week) period shall constitute a denial of the motion as of the date of the expiration of the period.

Any dissatisfied party may, within 7 days (1 week) after the entry of an order on a motion to supplement or correct the record, or, if no order is entered, within 7 days (1week) of the expiration of the 14-day (2-weeK) period provided in this rule for entry of an order by the trial court, seek appropriate relief in the appellate court.

The appellate court may, on the motion of a party or on its own initiative, order that a supplemental or corrected record be certified and transmitted to the appellate court if necessary to correct an omission or misstatement; provided, that, if the party is seeking to have included a transcript of proceedings that was omitted from the reporter's transcript, the party must file with the motion copies of the transcript purchase order as proof that the omitted portions were originally requested as required by Rule 10(b).

Every order of the trial court or appellate court directing that the record on appeal be supplemented or corrected shall be filed with the clerk of the court entering the

APPENDIX E, cont.

order, who shall forthwith serve a copy of the order on each party, on the clerk of the other court involved, and, if the order requires that the reporter's transcript of the proceeding be supplemented or corrected, on the appropriate court reporter.

(1) BRIEFS. Where relief is sought pursuant to this rule, the running of the time for filing briefs is not suspended. A party may, however, move the appellate court to suspend the time for filing briefs. Such a motion must clearly indicate each and every document and/or transcript that has been omitted from the record on appeal and its relevance to the appeal.

(2) SUPPLEMENTAL RECORDS. The provisions of these rules relating to the assembling and filing of the original record on appeal shall apply to any supplemental or corrected records required to be prepared under this rule, except that the court reporter's supplemental or corrected transcript shall be filed with the clerk of the trial court within 7 days (1 week) from the date the order relating thereto is filed with the clerk of the trial court, and the clerk of the trial court shall file the supplemental or corrected record on appeal with the appellate court within 7 days (1 week) from receipt of the reporter's transcript, or if there is no reporter's transcript, within 7 days (1 week) from the filing in the trial court of the order of the trial court or appellate court directing that the record on appeal be supplemented or corrected. The trial court may grant to either the clerk of the trial court or the court reporter an extension of time of 7 days (1 week) to complete either the clerk's supplemental or corrected record or the reporter's supplemental or corrected transcript, but in no even to a date later than 21 days (3 weeks) from the filing in the trial court of the order directing that the record on appeal be supplemented or corrected.

APPENDIX E, cont.

Alabama Rules of Appellate Procedure, Rule 28(e) provides as follows:

> References in the briefs to the record on appeal shall be to the appropriate page numbers of the record on appeal. If reference is made to a page of the clerk's record, the reference shall be preceded by the letter "C." If a reference is made to a page in the reporter's transcript, then the reference shall be preceded by the letter "R." If reference is made to evidence, it shall be made to the pages of the clerk's record or reporter's transcript at which the evidence was identified, offered, and received or rejected.

Canon 3C(1) of the Alabama Canons Judicial Ethics provides in relevant part as follows:

(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a part, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(d) He or his spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:

(i) Is named a party to the proceedings, or an officer, direction, or trustee of a party;